FILE COPY

Office Supreme Court, U.S.
DEC 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 531

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION and BRIEF.

ODE L. RANKIN,
BENEDICT J. SHORT,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

	PAGE
Summary Statement of Matter Involved	2
The Indictment	3
Statement of Facts	4
Articles Set Out in Indictment	5
Hartzel's Mailing List	6
Persons to Whom Articles Mailed	7
Articles Written Before War	10
Judgment of Circuit Court of Appeals	12
Jurisdiction	13
Questions Presented	13
Reasons Relied Upon for Writ	14
Specification of Errors	16
BRIEF IN SUPPORT OF PETITION.	
Point I—Where an article charged to be seditious shows no specific intent upon its face its publication alone does not violate the act	17
Point II—The Government failed to prove the issue it created that defendant had a specific intent in mind to violate the Espionage Act when he mailed out the articles; that the mode adopted and the character of the persons to whom the articles were mailed proves that the articles were not directed toward obstruction of the war service in recruiting or toward destruction of morale	26

Point III—The trial court erred in not instructing the jury on the subject of specific intent which is involved in the means alleged, which in effect excused the Government from the burden of prov- the specific intent alleged 32

Point IV—The Circuit Court of Appeals in affirming the judgment, by necessary intendment usurped the functions of the jury and deprived the defendant of an opportunity to have the jury pass upon the question of specific intent 37

Table of Cases Cited.

Abrams v. U. S., 250 U. S. 616 ..... 21, 22, 23

Debs v. U. S., 249 U. S. 211 ..... 18, 20, 21, 34

Ex Parte Frohwerk, 248 U. S. 540 19

Frohwerk v. U. S., 249 U. S. 204 ..... 18, 19, 20, 21

People v. Guedel, 43 Ill. 226 37

Pierce v. U. S., 252 U. S. 239 ..... 21, 24, 38

Schaefer v. U. S., 251 U. S. 466 23

Schenck v. U. S., 249 U. S. 47 ..... 18, 19, 20, 21

Text Books Cited.

16 Corpus Juris 113 ..... 31, 36

31 Corpus Juris 846 34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No.

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioner Elmer Hartzel respectfully shows to the court as follows:

That he is a resident of the County of Cook and State of Illinois and is a citizen of the United States, born at New Castle, Pennsylvania, on September 9, 1892, of native-born parents.

That he was sentenced by the District Court of the United States for the Northern District of Illinois, Eastern Division, on February 8, 1943, to a term of five years upon an indictment charging violation of sections 33 and 34 of Title 50, United States Code, being sections 3 and 4 of the Espionage Act.

That on appeal from said judgment the Circuit Court of Appeals for the Seventh Circuit, on October 14, 1943, affirmed said judgment; and on November 10, 1943, denied a rehearing of said cause.

Summary Statement of Matter Involved.

On December 18, 1942, the Grand Jury returned an indictment in the said District Court charging Elmer Hartzel, petitioner, one Elmer William Soller and one Newell Mecartney, with violation of the Espionage Act by preparing and publishing certain articles with intent to bring about conditions violative of section 3 of the Espionage Act, and conspiring to do so.

The indictment contained seven counts, six of which charge substantive offenses and the seventh count charging conspiracy to commit the substantive offenses charged.

The defendants pleaded not guilty, were tried by a jury, and all were found guilty,—petitioner Hartzel upon all counts and the defendants Soller and Mecartney upon counts 5, 6 and 7.

On motion for new trial, defendant Newell Mecartney was granted a new trial and discharged.

Motions for directed verdict, motion for new trial and in arrest of judgment were denied with exceptions and a bill of exceptions was presented.

On appeal, it was held that there was not sufficient proof to sustain the judgment as to Soller and that he was entitled to have had a directed verdict, and the judgment as to Soller was reversed and he was discharged.

The Circuit Court of Appeals then affirmed the judgment as to petitioner Elmer Hartzel, and on petition for a rehearing the opinion and judgment were adhered to and the petition for rehearing was denied on November 10, 1943.

The Indictment.

The charges are based on the preparation, publishing, circulating and distributing among persons eligible and available for recruiting and enlistment services in the military and naval forces of the United States, certain articles entitled: (1) The British: An Inferior Breed; (2) The Jew Makes a Sacrifice: The Forthcoming Collapse of America; and (3) A document not named in the charges but afterwards known in the evidence as: The Diseased Spinal Cord.

Counts 1, 3 and 5 charge, respectively, that, the United States being at war, the defendants did unlawfully, wilfully, knowingly and feloniously obstruct the recruiting and the enlistment service by preparing, publishing, circulating and distributing the said articles (one of which is named in each count) to available and eligible persons, which articles, it is charged, were, by defendants, intended to induce such available persons to fail and refuse to

enlist, and to refuse to submit to registration under said Act for services in the military and naval forces of the United States contrary to the form of the statute, etc.

Counts 2, 4 and 6 charge in apt terms, respectively, also like acts and intentions to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the naval and military forces of the United States by preparing, publishing, circulating and distributing the said respective articles, one of which articles being the basis of each count, contrary to the statute, etc.

Count 7, the conspiracy count, charged conspiracy among the defendants to violate the provisions of Section 33 of said Act.

Statement of the Facts.

The facts out of which this prosecution arose may be briefly stated as follows: The defendant Elmer Hartzel, prior to the entry of this country into its present war, composed certain articles of a controversial and political nature, which he mailed out to persons on a mailing list which he had prepared for that purpose.

His mailing list was composed of headline personalities, prominent persons in the political, social and fraternal world, societies, organizations, etc., which he had largely gathered from newspapers, directories, almanacs, etc.

After Pearl Harbor Hartzel composed three articles of like nature which were mailed out in like manner, upon which the first six counts of the indictment are based.

Hartzel had his articles mimeographed at the shop of the defendant Soller, whose place of business was in the office of defendant Mecartney, who was joined in the indictment. Hartzel had no connection with Soller except the business relationship. Soller had nothing to do with the composition or distribution of the articles. He printed them and received his pay. Soller sub-let space in a suite of rooms owned or controlled by Mecartney.

Mecartney was held by the Trial Judge after verdict to be a by-stander and he was granted a new trial. The Circuit Court of Appeals reversed the case as to Soller.

It was not denied that Elmer Hartzel was the author of all of the articles in question and that he mailed them out personally and no person was interested in the matter of composing or mailing them, other than he.

The Articles Set Out in the Indictment.

Three articles are set out in the indictment, upon the composition, printing and distribution of which the crimes were charged. These three articles were composed, mimeographed and mailed out after Pearl Harbor. The article declared upon in Counts 1 and 2 entitled "The British: An Inferior Breed" (Tr. 3), and the article set up in Counts 3 and 4 entitled "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" (Tr. 6), were written by Hartzel in the spring of 1942, mimeographed by Soller and mailed out by Hartzel in June, 1942. The article called "The Diseased Spinal Cord," portions of which are set out in Counts 5 and 6 (Tr. 10), and in full (Tr. 73), was written by Hartzel in July, 1942, mimeographed by Soller and mailed out by Hartzel in August, 1942.

The Court will find the articles entitled The British an Inferior Breed printed in full in Count 1 of the indictment, Transcript page 3, and also at page 70. The article entitled The Jew Makes a Sacrifice: The Forthcoming Collapse of America, is set out in full in Count 3, at page 6, and again at page 71; and excerpts of The Diseased Spinal Cord are set out in count 5 at page 10 and is in full at page 73 of the Transcript. The articles are quoted in part in the opinion of the Circuit Court of Appeals (Tr. 175).

Hartzel's Mailing List.

The defendant Hartzel had a mailing list of headline personalities, societies and organizations to whom he mailed out the several articles introduced in evidence. Hartzel commenced compiling this list in January, 1941, at the time he wrote the first article in question, and wrote the article Revolution Will Come to America (Govt's Ex. 60, Tr. 88-95). He finally had a mailing list of 750 names, but at no time was more than 600 documents sent out (Tr. 126). This list consisted chiefly of prominent people, Congressmen, Representatives and Senators. The type of persons was prominent, representative people. As time passed he began to eliminate a number of Representatives and Senators. Out of the World Almanac he got the names of patriotic societies such as Daughters of the Revolution. We the Mothers Mobilize, a list Hartzel considered patriotic organizations; it included fraternities, sororities and organizations of that type; the National Committee of America First, and of Frank J. Loesch, and bishops, and church representatives (Tr. 126-127). The names were compiled from various sources, names of prominent personages,

such as associations and fraternities taken from the World Almanac; from a government publication containing a list of labor unions; persons engaged in the America First Committee whose names were in the headlines; American Legion, State and District Commanders whose names were taken from telephone directories at the Public Library, etc. (Tr. 79).

In composing and the mailing out of these letters, Hartzel had no assistance (Tr. 80, 130, 131).

Persons to Whom Articles Were Mailed.

The Government proved that the three articles declared upon had been received through the mail by certain persons and organizations, as follows:

1. The United States Infantry Association, publishers of the Infantry Journal, a service publication (Tr. 18).

2. Major General H. H. Arnold, Commanding General of the United States Army Air Force, War Department, Washington, D. C. (Tr. 19).

3. Joseph Huckins, Lt. Col. of the General Staff Corps, U. S. Army, San Antonio, Texas, testified to the receipt of articles in an envelope addressed to Colonel Hastings, Chief of the Military Intelligence Division (Tr. 19).

4. Franklin Bliss Snyder, President of Northwestern University (Tr. 20).

5. American Newspaper Publishers, 360 North Michigan Avenue, Chicago (Tr. 20).

6. Kiwanis International (Tr. 21).

7. Lions International (Tr. 21).

8. Air Line Pilots Association (Tr. 22).

9. American Legion Department of Illinois (Tr. 22).

The indictment in this case sets out a special set of facts which are charged to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

It was contended below that the character of those allegations raised issues of *specific, actual, guilty* intent which the Government was bound to prove as laid; that it was not enough to say that a presumption could be indulged from the face of these documents and that from such documents defendants might be presumed to intend any natural and probable results of the language used; that in a criminal case a specific intent is not to be presumed from the wording of documents which on their face do not show a specific intent.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel by extraneous evidence that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of

alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific, intention accompanied said acts." (Tr. 133-134)

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

In this we assert the Court erred and that our exception to the charge on the subject of intent should be here sustained.

Articles Written Before Pearl Harbor.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 77); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 83). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis" (Tr. 85), and Exhibit 47, "The Condition of Our Leader" (Tr. 88).

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent and highly prejudicial.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 81); "Roosevelt's Illness" (Tr. 83), and "Revolution Will Come to America" (Tr. 88-94). These articles, together with two other articles, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to criticism of the Jew. The article "Roosevelt's Illness", written in 1940 (Tr. 83), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines: "Roosevelt's Infantile Paralysis" is another psycho-political article: "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition: the article "Revolution Will Come to America", was composed in 1941. The court told the jury he had allowed them in evidence on the question of intent. The court said:

> "Some other documents have been admited in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, men-

tioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

It was also contended that prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents competent to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began; that if they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events.

Judgment and Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Hartzel*, 138 Fed. (2d) 169 (Advance Sheet No. 3, November 29, 1943).

The Circuit Court of Appeals reversed the case as to Elmer William Soller who had been convicted under Counts 5, 6 and 7 and affirmed as to petitioner Elmer Hartzel.

The holding of the Court was to the effect that the test as to what constitutes a seditious utterance is not to be limited merely by those cases where a direct appeal is made upon the face of the document in question and said (Tr. 181):

> "If the condemned utterance is reasonably calculated to produce the prescribed result the purpose and motive is within the province of a jury."

On the question of specific intent the Court sustained the viewpoint of the trial court that a specific intent was

provable by the same type of proof as a general intention, i.e., that it is provable by presuming that the defendant intended the natural and probable consequences of his acts; that is by reasoning from effect to cause instead of from cause to effect.

In thus holding it is contended the Circuit Court of Appeals usurped the functions of the jury by deciding that defendant Hartzel mailed out the articles with a specific intent that their effect should be to create the conditions charged in the indictment, injure the morale and create insubordination, and thus invaded the province of the jury by deciding a question of fact which the defendant had a right to have passed upon by the jury and which was kept from the jury.

Jurisdiction.

This Court has jurisdiction to review this cause under Section 240 of the Judicial Code and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court (U. S. C. A. Cumulative Annual Pocket part to Title 18).

Questions Presented.

Where the documents written are alleged to have been published with the specific intent to interfere with the enlistment service of the armed forces and to cause and attempt to cause insubordination, mutiny and refusal of duty in the military and naval forces; and where upon their face the articles have no reference whatever to the military forces or the draft, selective service, recruiting

or enlistment, and no proof is made of any such intent or purpose in the defendant's mind, independent of the articles themselves, is the jury warranted in finding the defendant guilty?

Is the constitutional right of freedom of speech interfered with by rendering judgment upon such verdict and imprisoning defendant upon such judgment?

Was the province of the jury invaded and its function usurped by the Circuit Court of Appeals by its holding that a specific intent appears in the evidence and affirming instead of reversing the judgment, when the trial court kept that very question from the jury by refusing to so instruct them upon request?

Did the Court err in allowing in evidence articles written when we were at peace, admittedly innocent and protected by the constitutional right of freedom of speech, where the issue developed was whether the same type of articles were charged to be seditious because of a subsequent state of war coming into existence?

Reasons Relied Upon for the Allowance of the Writ.

I.

There is no reference to the draft, recruiting service, conscription, or volunteer service upon the face of the articles and the Government made no proof of a specific intent to violate the law outside of mailing the documents themselves.

In all of the sedition cases found passed upon by this Court the documents published have some specific reference to the draft, the recruiting service, conscription,

volunteering, or selective service, in such manner as to indicate a specific intent to injure the morale of the forces or cause insubordination, etc.; but in no case found has it ever been held that a defendant may be found guilty because such results might indirectly result from publication of documents with no such reference upon their face and where there was no proof of a guilty intent otherwise made in the record.

Defendant was writing a series of articles which were not seditious prior to this war; after the war the articles declared upon in the indictment were written and upon the trial the court allowed the prior articles, innocent when written, to be received in evidence on the question of whether defendant had a guilty intent when he published like articles after we were at war. Because of the nature of the articles it was highly prejudicial.

II.

The defendant's constitutional right of freedom of speech was interfered with by the rulings of the court and judgments upon the verdict and on appeal.

It was assigned as error (Tr. 166) and argued that defendant's constitutional rights were invaded by the judgment and the Circuit Court of Appeals ruled on its opinion (Tr. 180) that the articles were not privileged as free speech.

III.

The Circuit Court of Appeals by its judgment in affirmance deprived defendant of his right of trial by jury in deciding a question of fact withheld from the jury by the trial judge.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in receiving improper evidence; in instructing the jury improperly and refusing to instruct the jury as requested.

The Circuit Court of Appeals erred in affirming the judgment.

Wherefore it is respectfully requested that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit

Ode L. Rankin,
134 North LaSalle Street,
Chicago, Illinois,
Phone Randolph 6500.

Benedict J. Short,
10 South LaSalle Street,
Chicago, Illinois,
Phone Randolph 0088.
Attorneys for Petitioner
Elmer Hartzel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Hartzel*, 138 Fed (2d) 169 (See Advance Sheet No. 3, November 29, 1943).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of this court governing criminal procedure (U. S. C. A. Cumulative Annual Pocket part Title 18).

The order of the Circuit Court of Appeals became final on November 10, 1943, on which date it denied the petition for rehearing (Tr. 203).

ARGUMENT.

I.

Where the Article Charged to Be Seditious Shows No Specific Intent Upon Its Face Its Publication Alone Does Not Violate the Act.

It is our contention that where nothing appears upon the face of the articles showing a specific intent to commit the crimes charged and no evidence is introduced by the Government to show the criminal and specific intent, inherent in the crime charged, such crime is not proven; and that the presumption of innocence is not overcome, and reasonable doubt still exists; and that the true rule is that where on the face of the circulated document no specific intent appears to commit the very crime charged and no proof is made otherwise by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and, when proven, it supplies no evidence of intent.

In the leading cases which have reached this court, the specific intent appeared in the language of the written documents, which together with proof of the mode of distribution and the persons among whom distributed was held to support convictions.

We analyze those cases for purposes of illustration.

In the first three cases reaching the high Court, all argued in January 1919, there was no dissenting opinion. All three of these cases, *Schenck* v. *U. S.*, 249 U. S. 47, *Frohwerk* v. *U. S.*, 249 U. S. 204, and *Debs* v. *U. S.*, 249 U. S. 211, were affirmed and Mr. Justice Holmes wrote

the opinions of the Court in all of them, and in the *Schenck* case stated a general rule by which to decide such cases which we hereinafter quote. First we will analyze those three cases.

In the *Schenck* case (arising under the Act of June 15, 1917), the medium used for distribution of statements was leaflets in which there was specific reference to the draft, stating, among impassioned utterances, that: "A conscript is little better than a convict", and that conscription was "despotism in its worst form."; and the class of persons among whom the leaflets were distributed was men who had passed exemption boards, drafted men. In the *Schenck* case the Court laid down the general rule for the decision of such sedition cases, as follows:

> "The question in every case is whether the words used were used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree." (p. 52).

In the *Frohwerk* case the medium of distribution was the Missouri Staats Zeitung, a newspaper published in a metropolitan center, and the articles therein, on which the charges were based, bore upon their face specific reference to the draft service and resistance to it. There was no bill of exceptions (*Ex parte Frohwerk*, 248 U. S. 540), to show excusing circumstances, so the case was decided upon the nature of the medium used, the persons possible to be reached by that medium, and the character of the articles published. The court visioned possible defenses (p. 208), but as they were not in the record the case was affirmed with the hesitating statement, and apparently against mental inclination, that:

> "We are driven to the conclusion that the record shows no ground upon which the case can be reversed." (p. 210).

In the *Debs* case the medium of communication was a public speech to a concourse of people in which Debs openly advocated resistance to the draft and praised and sympathized with others who had been convicted and imprisoned because of resistance to the draft. Again, Debs addressed the jury in his own behalf, and reiterated his public statements in challenging terms, to the distress of his counsel (p. 215). So, the medium of communication being ample, and the statements openly obnoxious and defiant, the Supreme Court affirmed the judgment.

All three of the cases, *Frohwerk*, *Schenck* and *Debs*, were affirmed,—the *Frohwerk* case, because there the articles referred to the draft in a derogatory manner and there was no bill of exceptions; the *Debs* case because Debs stood before his jury and defiantly iterated, reiterated, and affirmed his seditious utterances leaving the Court helpless to aid him; and the *Schenck* case because the documents circulated called conscription a monstrous wrong and advised the persons circularized,—men who had passed exemption boards, to assert their rights and not to submit to intimidation.

But out of these cases is to be drawn these essentials,—that the document must be of such nature that it is calculated to create the injury prohibited; the means of circulation must be ample to reach the class of service men or draftees, and the persons reached must be the type on whom the statements would react "to the injury of the service of the United States", for it is clear the law is not aimed at isolated cases, but at causing insubordination, etc., in the "*forces*", and obstruction to the "recruiting or enlistment *service*".

The Cases in Which Dissenting Opinions Were Filed.

After the unanimous opinions in the three cases, *Schenck, Frohwerk* and *Debs,* were filed, there arose three other cases, *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v. *U. S.*, 251 U. S. 466, and *Pierce* v. *U. S.*, 252 U. S. 239, in all of which Justices Brandeis and Holmes filed dissenting opinions. A study of the opinions majority and minority opinions in these cases furnishes a true rule for decision of this case which is that specific intent is sufficiently proven if that intent appears upon the face of the document by direct reference to the draft or enlistment service in a derogatory manner sufficient to cause clear and present danger that the evil Congress sought to avoid will arise.

In the case of *Abrams* v. *U. S.*, 250 U. S. 616, a conspiracy case, the Court in its majority opinion stated that:

> "Men must be held to have intended and to be accountable for, the effects which their acts were likely to produce." (p. 621).

In conspiracy the effect of the acts is not the basis of decisions as we all know, so the language used must be looked at in its setting and not as a rule of decision. The majority opinion there held:

> "• • • the plain purpose of their propaganda was to excite at the supreme crisis of the war, disaffection, sedition, riots and, as they hoped, revolution, in this country for the purpose of embarrassing, and if possible, defeating the military plans of the Government in Europe" (p. 623).

And the Court said:

> "Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established" (p. 618).

The Dissent of Justice Holmes.

Now the dissent of Justice Holmes, joined in by Justice Brandeis, was predicated essentially, at least largely, upon the ground that no *specific intent* had been shown to have been in the minds of the accused to accomplish the *objectives* charged; whereas the majority had held that upon the face of the documents the objective was clear; and that was what the quote from the majority opinion referred to when it said men were to be held to the consequences their acts might produce.

Now in the *Abrams* case Justice Holmes points to the absence of proof of specific intent. He said:

> "But to make the conduct criminal the statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war'. It seems to me no such intent is proved" (p. 626).

The Justice then went on to expound the doctrine of *specific intent*. He said:

> "I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge, at the time of the act, that the consequences, said to be intended, will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law, might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow whether he, individually, could forsesee them or not.
>
> But when the words are used exactly, a deed is not done with intent to produce a consequence, unless, that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even

> if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind" (pp. 626-627). * * * "Congress certainly cannot forbid all effort to change the mind of the country. Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so" (p. 628).

Now the majority opinion of the Supreme Court in the *Abrams* case did not say that the doctrine of specific intent did not apply to such cases, but, what it necessarily held was that the rule that specific intent must be shown was satisfied by the expressions on the face of the papers, quoted in the opinion, such as:

> "Workers of the World, Awake! Rise! Put down your enemy and mine. * * * Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian Worker fights for freedom but also here in America lives the spirit of Revolution. * * * Workers up to fight" (pp. 620-622).

While the minority opinion was that a specific intent did not appear in the language to accomplish the particular criminal objectives charged in the indictment.

The dispute was over the application of the rule to the facts and not over the rule itself.

In the case of *Schaefer* v. *U. S.*, 251 U. S. 466, there was a dissenting opinion by Justice Brandeis joined in by Justice Holmes. The majority opinion held that the articles published in the Philadelphia Tageblatt, there in question, upon their face showed the intent charged in the

indictment; and we suggest that if that intent were on the face of the paper it would of necessity be specific.

In *Pierce* v. *U. S.*, 252 U. S. 239, there was also a dissenting opinion by Justice Brandeis concurred in by Justice Holmes. The case involved the distribution of a pamphlet entitled "The Price We Pay". In Baltimore, District Judge Rose had ruled its circulation was not illegal and discharged the accused by a directed verdict. The distribution of some 5000 copies was then made by persons in Albany among whom was Pierce. It was held by the majority opinion:

> "It was shown without dispute that the defendants distributed the pamphlet—The Price We Pay—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution" (p. 249).

Thus the majority opinion is founded upon the idea that the specific intent appeared upon the face of the document itself (p. 249), which openly denounced the drafting and recruiting of sons when they grew up to soldier size, and age after age, mounting up and up (pp. 245-246). That this was so is emphasized by the statement in the minority opinion that "the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect" (p. 256).

The dissenting opinion further said concerning the charge that the defendants conspired and attempted wilfully to "cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces" that:

> "No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been

said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.

"A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces" (p. 273).

The Lesson to Be Learned From the Conflict of Opinion in Sedition Cases.

Out of the several Supreme Court cases cited by opposing counsel it is thought this much is obvious: That the majority of the Supreme Court were of opinion that where, upon the face of the writings distributed, there appeared specific references to the draft and recruiting, advising resistance, etc., that was evidence of specific intent; which, instead of militating against the proposition which we have here advanced really, and in fact, sustains our point of law made here that where nothing appears upon the face of the paper pointing to the crime charged and no evidence is introduced to furnish the criminal and specific intent, inherent in the crime charged, the crime is not proven; the presumption of innocence is not overcome, the reasonable doubt still exists.

We respectfully suggest that the true rule is that where on the face of the circulated documents no specific intent appears to commit the very crime charged and no proof is made by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and it supplies no evidence of intent.

II.

The Government Failed to Prove the Issues It Created in Its Indictment and Defendant's Right to Freedom of Speech Under the Constitution Was Invaded By the Conviction.

We commence this section with the suggestion that statements used in writings are protected by the freedom of speech provision of our Constitution up to the point where tolerance must end and self-preservation must begin; where government must assert its paramount right to its life and existence; to a point where, as has been said, a citizen creates a danger clear, present and imminent.

If, upon their face, such writings as are here in question are equivocal and indecisive, the presumption of innocence and reasonable doubt safeguard the defendant until proof by the Government shows that acts of the defendant have created a clear and present danger. There is no presumption of law or fact that a defendant has gone too far in exercising his basic right to freedom of expression. The Government must prove its allegation that he has exceeded his constitutional allowance of liberty and prove that fact beyond reasonable doubt.

The Charges Should Be Proven As Alleged.

Where writings are not clearly and unmistakably seditious, proof *dehors* the instrument is required to support the charge that they are and that the writings were published and circulated to effectuate the seditious intent alleged; otherwise there would be no constitutionally

protected right to expression; otherwise it would cast the burden upon the citizen to prove he was within the constitutional protection instead of upon the Government to prove he had gone beyond his constitutional guaranty.

The documents declared upon, do not, upon their face, contain any reference to the recruiting, enlistment or draft whatever. There is only expression of racial criticism, political opinions, expressions concerning governmental policies, and derogatory remarks but not one word advocating resistance to draft, discouraging enlistment or recruiting, counseling insubordination, disloyalty, mutiny or refusal of duty.

There is not upon the face of these documents any indication of an affirmative effort or intention to obstruct the war effort as such.

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt.

The documents, not furnishing, in and of themselves, positive and conclusive evidence of such obstruction of recruiting and enlistment service, or attempt to destroy morale, proof of such objectives must be found, if at all, in the record otherwise made by the Government.

But the Government proved only that the articles were mailed to representative persons in the public headlines and to societies, unions, clubs, papers and officials of

Congress, etc., and that such people and organizations were the elements or stratum of society into which the documents were sent.

There was no proof made that the articles were distributed among the armed forces or persons eligible for the selective service or persons eligible to enlist in the service, with animus and intent to stall the recruiting service or break down the morale of the armed forces.

Hartzel's Mailing List Was Headline Personalities.

The statement taken from Hartzel by F.B.I. Agent Carroll (Tr. 75-81) shows in what manner Hartzel made up his mailing list and the types of personages to whom his writings were sent. He obtained his names from various sources. From World Almanac he obtained the names of various prominent personages, associations and fraternities; from a Government list, certain labor unions; from newspapers, the names of persons engaged in America First Committee activities; from telephone directories, the names of State and District Commanders of the American Legion; and he mailed to such organizations as Daughters of the American Revolution and We the Mothers Mobilize (Tr. 79). His mailing list of 750 was made up mostly of prominent people and a large portion were sent to congressmen, senators and other representatives. The type reached and intended to be reached was prominent, representative people (Tr. 126). The proof on this was affirmative and no other indication is in the record.

In making its proof, the Government proved that Hartzel had mailed his articles to the United States In-

fantry Association, publishers of the "Infantry Journal," the Major General of the United States Army, Chief of the Military Intelligence Division, the President of the Northwestern University, the American Newspaper Publishers, Kiwanis International, Lions International, Air Line Pilots Association, American Legion Department of Illinois (Tr. 19-22). These are, of course, a select list and the army officers or employees were brought here to testify. But it all adds up to a list of top ranking personages, heads of movements, and political and social organizations, which disproves the allegation that the articles were directed toward obstruction of the war effort by specifically circularizing those persons inducted into the armed forces and persons eligible therefor.

There was no proof of a specific circulation of the articles among eligible draftees, or volunteers, or those already inducted, nor that such was intended; so that the record speaks that there was no specific or actual intent to obstruct recruiting or enlistment or destroy morale in the manner or method of distribution of the articles.

The fact that after reading the articles, some one may have incidentally turned away from volunteering, or a member of the armed forces have gone A.W.O.L., is not the test. Such action might result from the most innocent statements of any one or some special urge; but that is not the test; the law is only violated by wilfully obstructing the recruiting or enlistment service, or wilfully causing or attempting to cause the breakdown of morale of which the Government made no proof. Injury to the *service* is the language of the law.

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt.

The effect is that the defendant was convicted for having written and mailed the articles; for the act not the intent with which the act was done; and no intent, general or specific, to do injury to the military or war service of the United States in the manner charged was shown to have been in Hartzel's mind when he penned the articles and mailed them out. Wilfulness and the evil intentions alleged, were not proven, and without them no crime was proven.

Without proof of a wilful purpose,—which means an affirmative, stubborn intent and purpose existing in the mind to cause insubordination, disloyalty, mutiny or refusal of duty, or to wilfully obstruct the recruiting or enlistment service,—the law cannot be said to have been violated. The Government did not show such a condition of mind. Hence it showed no crime.

A General Intent Is Not Sufficient. Specific Intent Is Essential.

If the Government here contends, as it did on trial, that a presumed intent, *i.e.*, that a person is presumed and bound to intend natural and probable consequences of his acts, is all that is necessary to prove the intent here alleged,—a wilful felonious purpose, then we reply that the Government proved no actual consequences and

the argument is sophistry. Effect must be shown before a cause can be said to exist or become material. If there are no consequences, no effect, no cause can exist, all of which is axiomatic.

There can be no question but that the very essence of a criminal attempt is an existing specific intent. (16 Corpus Juris 113.) To attempt is to specifically intend, and try.

The allegation that insubordination, etc., was wilfully caused and recruiting, etc., wilfully obstructed, includes a specific intent; and the allegation that the articles were prepared and mailed with a certain named intent, purpose and objective is not satisfied by presumptive proof, for it alleges a specific intent.

A defendant's constitutional right is not to be taken away by some technical evidentiary presumption relied upon in lieu of proof.

Therefore we conclude that the Government proved only that Hartzel wrote the articles and that they were sent to certain persons, and no more; and that the Government therefore failed to show facts sufficient to take the case into the field of apparent danger clear and imminent, and which only would overcome the right of defendant to that quantum of freedom of speech and press guaranteed by the First Amendment to our Constitution.

For the error in refusing to direct the jury to find defendant not guilty, the judgment should be reversed.

III.

It Was Error to Instruct the Jury That the Defendant Was Presumed to Intend the Natural and Probable Consequences of His Acts and Language in a Case Involving a Specific Intent, and an Ambiguous Writing.

It is contended that the court erred in instructing the jury as to the proof of the intent with which the documents were prepared and disseminated through Hartzel's mailing list.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some

one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific intention accompanied said acts" (Tr. 133-134).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

We call the attention of the Court to the following quotation from the opinion of this Court in the case of *Debs* v. *U. S.*, 249 U. S. 211, 216, as follows:

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effects to obstruct the recruiting service, etc., and unless the defendant had *the specific intent so to do in his mind.*" (Italics for emphasis.)

Specific Intent Is Involved in the Means Alleged.

The allegation in the counts that the defendants wilfully did cause and attempt to cause insubordination, etc., and did wilfully obstruct, etc., is a charge that might be proven by various types of acts of the defendants. But the indictment goes on further and alleges a certain means through and by which it is said the defendants committed those crimes, *i. e.*, by publication and dissemination of certain articles which were by them *calculated and intended to induce* available and eligible persons to fail and refuse to enlist and submit to registration and *to cause* insubordination, disloyalty, mutiny and refusal of duty, etc. But the face of the documents do not bear out the allegations in the indictment so the Government had the burden of proving the specific intent alleged by other evidence *dehors* the documents.

The rule is that where the circumstances are such that the crime charged must have been done with a specific intent such intent must be alleged in the indictment and must be proved as alleged. (31 Corpus Juris 847, Sec. 461.) And where an offense may be committed in various ways the evidence must establish it to have been committed in the mode specifically charged in the indictment. (31 Corpus Juris 846, Sec. 460.)

The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

Now the character of those allegations raises issues of *specific, actual, guilty* intent which the Government was bound to prove as laid. It was not enough to say that a presumption could be indulged from the face of *equivocal documents*, if they be equivocal, which we do not admit, and that from such documents defendants might be presumed to intend the natural and probable result of the language used.

In a criminal case a specific intent is not to be presumed from the wording of equivocal documents. Extraneous evidence must be introduced, else the documents remain equivocal.

There must be results, consequences, to be answered for before the rule can apply, or one is not supposed to have intended the natural and probable.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*, the defendant was bound to intend, and hence, could not deny the consequences alleged.

A Criminal Attempt Has No Results Except Failure.

And particularly we urge that the instruction was misleading and completely in error when we consider that Counts 2, 4 and 6 contained the allegation of a criminal attempt, that is, that defendant did cause and attempt to

cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces, as well as having actually caused those conditions in the service.

The books agree that there are three elements in the crime of attempt, (1) the intent to commit the crime; (2) doing of some overt act in part execution of the intent; and (3) failure to consummate the crime (16 Corpus Juris 113).

In proving an attempt to commit a crime, a *guilty* intent must be shown; and it must not only be shown that there was a guilty intent, but there must be a *specific* intent to do the particular thing (1 Bishop's New Crim. Law, p. 466). "To convict one of an attempt to commit a crime, it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such an intent is essential." (16 Corpus Juris 113.)

As we interpret the holdings, this rule,—that one is presumed to intend the natural and probable consequences of his acts or language; as here said, has no application to criminal attempts for, in the law of attempt there are no consequences; there is only failure. Intent, act, failure.

The Means Alleged in an Indictment Must Be Proven As Laid.

It has always been held that the allegation of the means by which a crime is committed when there is more than one way of commission, is an essential part of the indictment, and being essential, must be proven as laid; and so it is that if the means by which a crime is alleged to

have been committed requires a specific intent, a specific intent must be proven to have accompanied the act and shall not be presumed from the act itself; the step of logic is from cause to effect, and not from effect back to cause.

To illustrate that proof of the means alleged is essential and material, a look at *People* v. *Guedel*, 43 Ill. 226, will interest. There Guedel was acquitted of murder by *shooting* the victim with a gun and was promptly reindicted for the same murder of the same party by *beating* him with the same gun; and it was held on plea of the prior proceeding that the acquittal under the first indictment was no bar to a prosecution under the second. Means is material.

The Action of the Court Lessened the Degree of the Government's Proof.

We think the Court erred in weakening or lessening the degree of proof necessary to establish the Government's case. It alleged the crimes were committed by a means involving a specific intent and we say the Court should have held the Government to strict proof of its allegations, and not given it a short cut to a verdict by way of presumption.

IV.

The Circuit Court of Appeals, in Affirming the Judgment, Has Usurped the Functions of the Jury By Here Deciding the Question of Specific Intent, a Question of Fact Upon Which the Trial Court Refused to Instruct the Jury, and Upon Which the Jury Did Not Pass for That Reason.

We think it obvious that the Circuit Court of Appeals invaded the province of the jury, for the reason that the

trial judge refused to give to the jury the requested instruction as to the necessity of proof of a specific intent to do the prohibited acts, and the question of intent being a jury question, the defendant has not had his day in court upon it. The Circuit Court of Appeals by assuming to decide that fact usurped the function of the jury.

In effect the Circuit Court of Appeals has made itself the jury, has sat upon the rights of the defendant, and, as if it were the jury, has decided a question which the law has entrusted exclusively to the judgment of the jury; and has actually substituted the Court's judgment for that of the jury; for upon that question of fact the jury should have been, but were not, permitted to pass.

We think this Court answered the question in the following quotation from the case of *Pierce* v. *United States*, 252 U. S. 239, 250, as follows:

> "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it *in the mode adopted*, and what were defendants' *motives in doing this*, were questions for the jury, not the court, to decide." (Italics ours.)

And we point out that what was there said was in a case where the documents were replete with statements having direct reference to the recruiting service which are quoted at large in the dissenting opinion at pages 256-264. There, with the documents full of violent language and distributed openly amongst persons likely to be affected, the Court yet considered that the matter was one for the jury, upon the intent. The reviewing court could there itself see the seditious nature of the documents upon their face and yet held that as the jury had the right to pass upon the question of intent involved, the Court would not disturb the judgment of the jury where it appeared that the jury *had passed* upon the intent with which the articles were distributed.

But how different the *Pierce* case is from this case;—there the jury had passed upon the intent where the documents were full of denunciations of drafting and recruiting of sons as they grew to soldier size, distributed among the prospective personnel of the armed forces; so the high court would not undo what the jury had advisedly done. There the Court did not interfere with the right of the jury to pass upon the question of intent, but held it to be the province of the jury so to do, and that the jury *had done so.*

Here the pamphlets were distributed by letter to persons of intelligence, which pamphlets, when examined, make no direct reference to the military or naval forces or the recruiting or enlistment service of the United States; whereas, in other cases cited on hearing, there was specific reference upon the face of the documents from which specific intent could be found, and in none of which was this question raised.

But here the specific intent of the defendant was not permitted to reach the jury upon the question of the circulation of articles having no reference to the armed forces or the service; and this Court has now affirmed the action of the trial judge in denying that right; yet almost in the same sentence, saying that the defendant has that right.

Now it will be noted that there is a wide difference between telling a jury that a defendant might be presumed to intend the natural and probable *result of language used* and telling the jury that the acts of a defendant in such case as this must be done *with an actual specific intention* in mind to commit the *offenses charged in the indictment;* one is general intent, the other specific intent.

The specific intent must come first in point of order as, in attempts, there are no results, (except failure) to be responsible for.

Where the act itself does not *inherently* carry with it the proof of a specific intent a specific intent must be shown by independent proof to have accompanied the act.

Consequences must be in the mental contemplation and purpose of the offender when he does the act; but that is to be proven, not presumed from consequences, for there are none from which to draw a presumption.

So we say that in affirming the judgment, the Circuit Court of Appeals denied the right of trial by jury upon a controlling question of fact in the case, and usurped the functions of the jury to decide the question of fact itself.

Conclusion.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view it of conviction for a crime the defendant did not commit.

Wherefore, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the Writ of Certiorari be granted and the cause reviewed.

All of which is respectfully submitted.

Ode L. Rankin,
Benedict J. Short,
Attorneys for Petitioner.